CHONG SIEW CHIANG

v.

CHUA CHING GEH & ANOR.

HIGH COURT BORNEO, KUCHING
RICHARD MALANJUM JC
[CIVIL CASE NO. S/KG. 150 OF 1985]
8 JULY 1992

TORT: *Defamation - Libel - Whether words complained of defamatory - Plea of qualified privilege - What constituted fair comment - Whether statement actuated by malice.*

The plaintiff, an advocate of the High Court of Borneo, was the elected Sarawak State Chairman of the Democratic Action Party (DAP). He was also the legal adviser of the Sarawak United Tenants Association. The 1st defendant was the secretary of the Sarawak United Peoples Party's Kuching branch. The 2nd defendant is the proprietor, publisher and printer of the *Borneo Post* a local daily. On 5 June 1985, the plaintiff who attended an extraordinary general meeting of the Kuching Tenants Association, made statements in relation to the enforcement of the 1984 Rent Control (Repeal) Ordinance passed by the state legislative council. This was reported in the *See Hua Daily*, a Chinese newspaper on 8 June 1985. In response, the 1st defendant held a press conference on 10 June 1985. This was reported in the *Borneo Post* on 11 June 1985 under the heading of "SUPP Kuching: Chong has incited tenants to use violence" with a sub-heading of "Tenants incited to use violence." The plaintiff claimed that the words in the statement were defamatory and by way of this action claimed damages as well as injunction and cost for libel against the 1st and 2nd defendants. The defendants did not challenge the publication of the words complained of. Instead they contended that the words were not defamatory and if they were, they were said on an occasion an of qualified privilege and were fair comment on matters of public interest and they were not actuated by malice.

Held:

[1] Whether the words complained of were defamatory it is necessary to consider whether it was calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or to lower him in the estimation of a right-thinking member of society. The words complained of were defamatory of the plaintiff in the way of his profession, office and in relation to his conduct.

[2] It was for the defendants to prove that the facts were qualified when they were published. In the case of the 1st defendant the dominant motive was more to attack and embarrass the plaintiff. As for the 2nd defendant, from the facts, the claim of qualified privilege on grounds of duty to publish failed.

[3] The statements relied on as statement of facts are not facts truly stated and as such are not capable of being fair. Also, the comments made cannot be one which a fair-minded person can honestly make.

[4] Honest belief to the truth of the statement is sufficient to negate malice. The dominant motive of the 1st defendant was a desire to make a political capital and in doing so outweighed his sense of caution. The 2nd defendant made no attempt to ascertain whether the comment made by the plaintiff was correct. The 2nd defendant was also actuated by malice when he published.

[1st and 2nd defendants held liable. Injunction granted in terms as prayed. Quantum of damages, unless agreed by the parties to be decided later. Costs to be decided later.]

Cases referred to:
International Times & Ors. v. Leong Ho Yuen [1980] 2 MLJ 86 ***(cit)***
Abdul Rahman Talib v. Seenivasagam & Anor. [1965] 31 MLJ 142 ***(foll)***
Beevis v. Dawson & Ors. [1956] 3 All ER 837 ***(cit)***
Jones v. Skelton [1963] 3 All ER 952 ***(cit)***
Kemsley v. Foot [1952] 1 All ER 501 ***(cit)***
Rajagopal v. Rajan [1972] 1 MLJ 45 ***(cit)***
Capital & Counties Bank v. Henty [1882] 7 AC 741 ***(cit)***
Grubb v. Bristol United Press Ltd. [1963] 1 QB 309 ***(cit)***
A.J.A. Peter v. O.G. Nio & Ors. [1979] 1 MLJ 226 ***(cit)***
J.B. Jeyaretnam v. Goh Chok Tong [1985] 1 MLJ 334 ***(cit)***
Syed Husin Ali v. Sharikat Percetakan Utusan Melayu Bhd. & Anor. [1973] 2 MLJ 56 ***(cit)***
Control Risk Ltd. v. New English Library Ltd. & Anor. [1989] 3 All ER 577 ***(cit)***
Lee Kuan Yew v. J.B. Jeyaretnam [1970] 1 MLJ 281; [1970] 3 MLJ 331 ***(cit)***
Lee Kuan Yew v. Chin Vui Khen [1991] MLJ 494 ***(cit)***
Viscount De L'Isle v. Times Newspapers [1987] 3 All ER 499 ***(foll)***
Prager v. Times Newspapers Ltd. [1988] 1 All ER 300 ***(cit)***
Adam v. Ward [1917] AC 309 ***(cit)***
Maidstone Pte. Ltd. v. Takenada Corpn. [1992] 1 SLR 772 ***(cit)***
S. Pakianathan v. Jenni Ibrahim [1988] 2 MLJ 173 ***(cit)***
Blackshaw v. Lord [1983] 2 All ER 311 ***(foll)***
Cox v. Feeney [1863] 176 ER 445 ***(dist)***
Webb v. Times Publishing Co. Ltd. [1960] 2 All ER 789 ***(dist)***
Turner v. MGM Pictures Ltd. [1950] 1 All ER 449 ***(cit)***
Laughton v. Sodor & Man [1872] LR 4 PC 495 ***(dist)***
Sutherland & Ors. v. Stopes [1925] AC 47 ***(cit)***
Telnikoff v. Matusevitch [1991] 4 All ER 817 ***(cons)***
London Artists Ltd. v. Littler [1969] 2 All ER 193 ***(foll)***
Truth (N.Z.) Ltd. v. Avery [1959] NZLR 274 ***(cit)***
Leverman v. Campbell Sharp Ltd. [1987] 36 DLR 401 ***(cit)***
Mercantile Marine Service Association v. Toms & Ors. [1916] 2 KB 243 ***(cit)***
Horrocles v. Lore [1975] AC 135

Legislation referred to:
Penal Code, s. 103
Defamation Act 1957, ss. 9, 12

Other source referred to:
Libel and Slander, Gatley, 8 Edn., paras. 50, 60, 62, 666, 729, 730, 789, 1338, 1339, 1340, 1342

For the plaintiff - George Lo with Arthur Lee; M/s. Arthur Lee & Co.
For the 1st defendant - William Chang; M/s. Yong & Co
For the 2nd defendant - Ting Sing Chuan; M/s. Yong & Wong

JUDGMENT

Richard Malanjum JC:

This is a claim by the plaintiff against the 1st and 2nd defendants for damages as well as for injunction and costs for libel contained in the article appearing under the main heading of "SUPP Kuching: Chong has incited tenants to use violence" with a sub-heading of "Tenants incited to use violence" (hereinafter referred to as (Ex. p. 6) having been tendered and admitted

as exhibit for the plaintiff) published in 11 June 1985 edition of the *Borneo Post*, a local newspaper. The substantial portion of (Ex. P6) was attributed to the 1st defendant and which was admitted in the Reamended Statement of Defence of the 1st defendant.

The plaintiff is an advocate of the High Court of Borneo who was admitted to the English Bar by the Honourable Society of Lincoln's Inn on 17 July 1966. The plaintiff upon his return from study qualified in law joined the Judiciary Department as a Magistrate for 2 years. At the end of 1967 he left the service to go into private practice under the firm of M/s. Chong Bros. He has been in private practice ever since. He is also a Notary Public since 1980 and a Commissioner for Oaths up to 1991. Besides being an active practitioner, the plaintiff has also been active in politics and in non-governmental organisations. Between the years 1974 to 1979, the plaintiff was an honourable member of the Dewan Undangan Negeri Sarawak, the Sarawak State legislative body, where he also sat as the Chairman of the Public Accounts Committee. In 1980, the plaintiff was elected as the Sarawak State Chairman of the Democratic Action Party (DAP) a registered political party in Malaysia and also as the national vice-chairman of DAP at national level. He held both the posts up to 1989. The plaintiff has also been the legal advisor of several associations in Sarawak such as the Sarawak United Tenants' Association which comprised of the Kuching Tenants' Association, the Sibu Tenants' Association and the Sarikei Tenants' Association.

The 1st defendant holds a Ph.D. in Biochemistry and has been in the private sector working in various capacities. Since 1985 he has been the Assistant Secretary-General at the central level of the Sarawak United Peoples Party (SUPP), a component party of the State Barisan National which forms the State Government. He is also a member of the Central Working Committee of SUPP. In 1978, he was elected as the deputy chairman of the Kuching Youth branch of SUPP. Between 1980 and 1982 he was the SUPP Central Youth Chairman. In 1985 he was also the Secretary of SUPP Kuching branch.

The 2nd defendant is the proprietor, publisher and printer of a local daily called the *Borneo Post*.

For the sake of clarity it may be appropriate here to reproduce the relevant portion of (Ex. P6) which the plaintiff claims to contain the offending words against him. I have underlined the words complained of:

> We are greatly concerned about the speech made by the DAP Sarawak state liaison chairman, lawyer Chong Siew Chiang at the Kuching Tenants Association on 5 June and the speech was reported in many Chinese newspapers.
>
> *We are shocked to hear that lawyer Chong had advised the tenants to resort to using "fists" or "parang" when being confronted by unreasonable shopowners.*
>
> Using parang is not a criminal offence, according to lawyer Chong and it can be used in the pretext of self-defence as clearly expressed in Penal Code 103.
>
> *We condemn lawyer Chong for his irresponsible utterance in advocating violence to settle dispute. As a practising lawyer and also the DAP state leader, we expect lawyer Chong to know his duty and responsibility to uphold the law and order of the country and to protect the life and property of the people.*
>
> *Instead, lawyer Chong has chosen to suggest to the tenants to resort to act of violence and even to the extent of misleading them to believe that using the lethal 'parang' is not a criminal offence.*
>
> *We are most disappointed with lawyer Chong for allegedly bringing great shame to the legal profession and for dragging the opposition politics to its lowest possible level.*

SUPP Kuching branch will be writing to the Advocates Association of Sarawak to ask them to look into lawyer Chong's speech for possible breach of professional code of conduct.

We will also report lawyer Chong's speech to the police department. We would request the police department to keep a close watch on the situation and if any tragic incident does happen among the tenants and the shopowners, *DAP should be made responsible for its role in instigating premeditated manslaughter.*

SUPP Kuching branch is greatly amused by lawyer Chong's self-defence that he is not out to make "trouble money". If lawyer Chong is out to protect the livelihood of the tenants and has great pity on the financial predicaments of the tenants, he should in his personal capacity sue the Sarawak State government and challenge the legality of the Repeal of Rent Control Ordinance.

The reason he gave in advising the tenants to sue the shopowners are dubious and illogical in the legal sense. Lawyer Chong's approach does make good business sense, for it means a possible hundred cases to be handled and with no liability to himself.

SUPP Kuching branch would like to appeal to the tenants and shopowners to remain cool and calm and to work out among themselves a mutually acceptable solution.

If all negotiations failed, then they should seek legal advice from many other alternative legal firms in the city.

The tenants must guard themselves from being made use of by irresponsible politician out to make some quick political capital, the statement concluded.

Later answering questions, Dr. Chua said it appeared that Encik Chong was putting thoughts into the minds of the desperate tenants.

As a lawyer, he should give legal advice and to allegedly advise the people to employ violence of whatever means should be condemned by all.

To another question, Dr. Chua believed that Encik Chong's action was to take advantage of the desperate tenants.

The said words complained of are found in para 5 of the reamended statement of claim.

The relevant events as adduced in evidence and were not in dispute leading to the publication of (Ex. P6) are as follows:

On 19 July 1984, the Rent Control (Repealed) Ordinance (hereinafter called the 'Repealing Ordinance') was passed by the Dewan Undangan Negeri Sarawak. It was tabled by a member of SUPP. The Repealing Ordinance was to take effect upon gazette notification. The Rent Control Ordinance only applied to buildings in Sarawak completed or built before the end of 1954 and from the First schedule of the said Ordinance it covered Kuching, Sibu and Sarikei towns. With the passing of the Repealing Ordinance tenants occupying buildings under the Rent Control Ordinance would no longer have any advantage on rent control. As a result there were expressions of opinion ventilated and those views appeared in the local dailies quite regularly since the passing of the said Repealing Ordinance. The atmosphere became bad when there was a gazette notification on the appointment of 31 May 1985 to be date of coming into operation the said Repealing Ordinance. Meanwhile, the plaintiff filed an action in the High Court Registry Kuching on behalf of his tenant's client on 4 June 1985. The filing of this action appeared in the local daily, the *Borneo Post* on 5 June 1985 together with a group photograph including the plaintiff. A copy of the newspaper with the said news item was tendered and admitted as defence exhibit (Ex. D1).

In the evening of 5 June 1985 there was an extraordinary general meeting of the Kuching Tenants Association held at the Hill Top Restaurant Kuching. There were about 300 people who attended in which there were some 8 people consisting of lawyers and reporters who were not members of the Kuching Tenants Association or any of the other tenants associations constituting the Sarawak United Tenants Association.

The plaintiff was invited to the function which began at about 6 p.m. However the plaintiff only arrived at 8 p.m. Very shortly the plaintiff was introduced and thereafter he started speaking which lasted over 2 hours. In the course of his speech there were responses from the floor in the forms of clapping, laughing, comments and suggestions.

On 8 June 1985, the *See Hua Daily News*, a Chinese newspaper came out with a front-page report of that evening event. The news report has been tendered as exhibit and marked ((Ex. D3) with (Ex. D3 (T)) as the agreed English translation. In view of the significance of (Ex. D3) I think it is important to reproduce in full its agreed English translation (Ex. D3 (T) as follows:

> When shopowners raise the rental in a big way or force an eviction, what should the tenants do? The legal advisor to the Sarawak Tenants' Association, lawyer Chong Siew Chiang advised the tenants ways to cope with various situations.
>
> (Kuching, 7 June)
>
> The legal advisor to the Sarawak Tenants' Association lawyer Chong Siew Chiang said:
>
> Since the 1984 Rent Control (Repeal) Ordinance has been made effective, tenants will face the problems of "rent increase" or "forced eviction" from the shopowners. To deal with these problems, the tenants must act according to the situations, and try their best to give their problems to their associations to handle.
>
> On 5 June lawyer Chong Siew Chiang was invited to speak at the extraordinary general meeting of the Kuching Tenants' Association.
>
> He said:
>
> On 19 July last year, the Rent Control (Repeal) Ordinance was passed by the State Legislative Council. Since then, many problems concerning the tenants have arisen. These problems are also becoming sociological and political problems. To the tenants, it concerns their immediate livelihood, in politics, it is to gain politically and to the shopowners, it is the time to get rich.
>
> Chong Siew Chiang described that in the past few months, the tenants are like a boat in the big ocean, in danger of being evicted. But the tenants have behaved very positively, which has enabled the legal action to be smoothly pursued.
>
> Lawyer Chong said: According to the Malaysian Constitution Ch. 4 paras. 4 & 74, when the State Legislation are in conflict, the Court has the power to rule that the law passed by the State Legislature to be void.
>
> Lawyer Chong Siew Chiang said: We cannot help asking, why the 1984 Rent Control (Repeal) Ordinance was passed by the State Legislative Council?
>
> He said: The SUPP State Legislative Council members particularly those from Kuching, Sibu and Sarikei, the three areas affected by the Rent Control (Repeal) Ordinance, did not speak a single sentence for justice in the State Council meeting. Because they were afraid to offend the shopowners, or possibly they themselves own many houses. Furthermore, some Ministers probably have many houses and cannot sell off. Therefore, they point their targets towards the tenants, and make the tenants suffer.

Chong Siew Chiang said: His undaunted task to handle the legal works to sue also has been subjected to many nasty remarks. They say, you people should not believe in Chong Siew Chiang, has no business therefore he takes up this business. Win he gets paid, loose he also gets paid, it must be has joy to handle the case.

He said: Although those people have said it that way, he would like to tell every one. Today, he is also a shopowner, but, he strongly opposes the repeal of the Ordinance.

Lawyer Chong said: Today, not a single state in West Malaysia is talking about the Repeal of Rent Control Ordinance, why Sarawak would suddenly pass the Rent Control (Repeal) Ordinance?

If Chong Siew Chiang has no business and has to take up the case for the tenants, then I would like to tell everyone, that there are many shopowners wanting me to handle their cases. But, because my stand is different, I resolutely will not stand on the shopowners' side.

In the Society, there are justice and injustice. When we have to make a choice, do not think that it is good for yourself all is well. If the thing is good for you, but it brings unrest and problems to the society, then even you make the money you will not have peace.

Chong Siew Chiang said: This time the suit is against different party but this does not mean we dare not sue the Government. This is because of better and sounder reasons.

Chong Siew Chiang said: If the Sarawak Tenants' Association still want to sue the Government, we still can do so.

He said: With the Repeal Ordinance now becomes effective, the tenants will from this month onward, receive letters from shopowners to raise rents or to repossess. How the tenants should handle these problems are worthy of discussion.

When being confronted by unreasonable shopowners who having served one month's notice for repossession, come to your shop with their men to lock up the doors, what should you do?

Chong Siew Chiang said: If the shopowner lock up your doors, you reopen them. If they remove your things, you report to the police. If the police comes but take no action, then you have no choice but to take your own initiative.

Chong Siew Chiang said: If being forced by the circumstance, after reporting to the police and the police does not take any actions, then you must rely on your own actions. This includes striking with your fists. If this does not help, you can even use parang. This action is justifiable because it is for self defence.

He continued: You may think using parang is a criminal offence and must go to jail for it. In fact this is not so, because in law it is for self defence, when a person hits you and you hit back, it is no offence. "Self defence" not only apply to physical threat to you, it also covers threat to your property. This is clearly stated in Penal Code s. 103.

Chong Siew Chiang said: If the shopowners have Court orders to remove things, then you let them.

According to the 1st defendant, and not disputed by the plaintiff it was a Saturday morning and while having his morning coffee in a coffeeshop the 1st defendant saw this news report and read it being equally proficient in Chinese having studied up to Chinese senior middle three in 1963. Thereafter, the 1st defendant returned to his office being the Operation Manager of a local company, Kim Chuan Seng Sdn. Bhd. at that time. From there he made telephone calls to the *See Hua Daily News* Office and also to his political colleagues namely, the Chairman of SUPP Kuching Branch, Yang Berhormat Song Swee Guan, the Kuching Youth head and the Women head of Kuching SUPP. He also called SUPP members who were active in the tenants' association. Having spoken to his colleagues it was decided amongst

themselves to look at the news report in detail and if necessary to come out with a press statement. The 1st defendant began to prepare a press statement in the afternoon of the next day, Sunday. Then came Monday (10 June 1985) the 1st defendant instructed the Executive Secretary of SUPP Kuching branch to arrange for a press conference at 10 a.m. The prepared press statement which by then had been agreed by his two colleagues namely, the Youth head and Women head of the SUPP Kuching branch, would be read and given to the representatives of the Press during that morning press conference. The press conference went on as arranged resulting in the (Ex. P6) appearing in the *Borneo Post* on 11 June 1985. There were also similar reports in other newspapers but they do not concern this action.

The relevant events as adduced in evidence and not in dispute that took place after the publication of (Ex. P6) and up to the commencement of this action are as follows.

After the publication of (Ex. P6) the plaintiff called for a press conference where he gave his statement in relation to (Ex. P6) and also made a demand to the 1st defendant to apologise within 3 days otherwise he would institute legal action. The representatives of the news media were present during that press conference and although the 2nd defendant was represented at the beginning by a reporter named Sulok Tawie, the said Sulok Tawie left the conference while the plaintiff was still giving his statement in Mandarin. The next day a report on the press conference held by the plaintiff appeared in the local Chinese newspaper namely, *Chinese Daily News* dated 12 June 1985 (Ex. P2) with the agreed English translation as (Ex. P3). There was no similar report in the *Borneo Post.* As a result of the report on the press conference of the plaintiff, the 1st defendant came out with another statement which appeared on 13 June 1985 particularly in the *Borneo Post* in English on the front page under the heading "Go ahead as you like, Chua tells Chong" (Ex. P7). The 1st defendant did not tender any apology as demanded by the plaintiff. Instead the 1st defendant told the plaintiff "not to hold his horses". With that statement of the 1st defendant this present action began. The plaintiff applied for an *ex-parte* interlocutory injunction against both the defendants but the hearing was made *inter parte*. On 24 June 1985, interlocutory injunction was granted. A written judgment was given by the learned Judge (Ex. P8).

At the commencement of the hearing of this action learned leading Counsel for the plaintiff applied for a direction to have the rebuttal evidence of the plaintiff (if any) on the defence of fair comment be made after the defendants have given their evidence. The ground for making the application was basically for convenience and owing to the facts of this case as perceived by the plaintiff. The case of *International Times & Ors. v. Leong Ho Yuen* [1980] 2 MLJ 86 was referred to in support. It was strenuously objected to by both learned Counsels for the 1st and 2nd defendants. In my ruling I allowed the application in the exercise of my discretion for convenience and in view of the issues pleaded. In fact in *Abdul Rahman Talib v. Seenivasagam & Anor.* [1965] 31 MLJ 142 a similar approach was also adopted by the trial Judge and was not made an issue on appeal. [See: [1966] 2 MLJ 66]. (See also: *Beevis v. Dawson & Ors.* [1956] 3 ALL ER 837). In the course of the hearing it was also agreed by the parties that the issue of damages is to be dealt with subsequent to the finding of liability.

The plaintiff claims that the words complained of as pleaded in para. 5 of the reamended statement of claim are defamatory of him as in their ordinary and natural meaning they meant or imputed to mean what the plaintiff has pleaded in para. 6 of the reamended statement of claim.

The 1st and 2nd defendants pleaded in their respective reamended statements of defence substantially the same points of defence namely, denial that the words complained of have defamatory meanings as pleaded by the plaintiff, that the words complained of were not

published of the plaintiff or of him in the way of his profession and office or in relation to his conduct, that if they were, they were said on occasion of qualified privilege and that they were fair comment on matters of public interest. The plaintiff joins issue with the defendants in their defences and alleges the defendants were actuated with malice when the words complained of were published.

It was not disputed during the hearing that (Ex. P6) referred to the plaintiff as he was mentioned by name or by other names such as 'lawyer Chong' or 'State DAP leader' which identifies to the plaintiff. The only instant where the 1st defendant stated that he was referring to DAP was that part of the words complained of which stated that DAP should be held responsible for premeditated manslaughter. However on reading (Ex. P6) as a whole and bearing in mind the subsequent police report lodged by the 1st defendant which was reported in (Ex. P4) with English translation in (Ex. P5), I can only conclude that that part of (Ex. P6) also refers to the plaintiff only who happened to be the DAP state leader at that time. If the 1st defendant sincerely believed that that part of the words complained of only referred to DAP, he should have disputed what was reported in (Ex. P4). I hold that (Ex. P6) was directed against the plaintiff. Thus, paras. 5 of both the Reamended Statements of Defence of the defendants fail. Further, the defendants did not challenge that there was publication of the words complained of and in fact admitted in their pleadings.

There are therefore 4 remaining primary issues before me, namely:

(a) Whether the words complained of in their natural and ordinary meaning were capable of defamatory meaning and whether they were defamatory of the plaintiff with the meanings attributed to them by the plaintiff;

(b) Whether when the words complained of were published the occasion was one of qualified privilege;

(c) Whether the words complained of were fair comment on a matter of public interest; and

(d) Whether the defendants were actuated by any malice in publishing the words complained of.

The first issue (a) is one of construction of the words complained of and at the same time to determine if they were defamatory of the plaintiff. The approach to such a construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extend to any reference or implication from which persons can reasonably draw. (See: *Jones v. Skelton* [1963] 3 ALL ER 952; *Kemsley v. Foot* [1952] 1 ALL ER 501; *Rajagopal v. Rajan* [1972] 1 MLJ 45). It is irrelevant what the publisher intended the words complained of to mean. (See *Capital & Counties Bank v. Henty* [1882] 7 AC 741; *Grubb v. Bristol United Press Ltd.* [1963] 1 QB 309; *A.J.A. Peter v. O.G. Nio & Ors.* [1979] 1 MLJ 226). It is also irrelevant what the readers understood the words complained of to mean for the purpose of deciding the ordinary and natural meaning of the words complained of. (See*: J.B. Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334. There is also no necessity for a plaintiff to prove falsity of the words complained of once they are found to be defamatory of the plaintiff. [See: *Abdul Rahman Talib v. Seenivasagam & Anor. (supra)*).

As to whether the words complained of were defamatory of the plaintiff the test to be considered is whether the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally. (See: *J.B. Jeyaretnam v. Goh Chok Tong* (*supra*)).

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

per Mohamed Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Percetakan Utusan Melayu Bhd. & Anor.* [1973] 2 MLJ 56 at p. 58 D (right).

Words could still be defamatory even if they did not really lower the plaintiff in the estimation of those to whom they were published. The law looks only to its tendency. (See: *J.B. Jeyaretnam v. Goh Chok Tong (supra)*; *Syed Husin Ali v. Sharikat Percetakan Utusan Melayu Bhd. & Anor.* (*supra*)).

In the present case in order to decide on the first issue (a) in the light of the principles of law stated above the following salient facts are also relevant for consideration:

(1) the words complained of were contained in a prepared press statement;

(2) that the press statement was issued as a result of a news report in the Chinese *See Hua Daily News* (Ex. D3 with Ex. D3 (T);

(3) the press statement was made by the 1st defendant, a member of SUPP, a political party forming part of the State Government;

(4) that the plaintiff at the material time was the state leader of DAP, an opposition political party

(5) the words used and the mode of publication, that is, through a press conference especially convened.

In those circumstances and having considered (Ex. P6) and other relevant evidence adduced, I find that the words complained of were capable of being defamatory and were defamatory of the plaintiff and of him in the way of his profession, office and in relation to his conduct. The sting lay in the allegations and implications that the plaintiff being a lawyer and a leader of a political party advocated violence in settling disputes, that the plaintiff being a lawyer misled his listeners on the use of lethal weapons in the guise of self-defence, that the motive of the plaintiff was for self-interest and for his own gains and that the plaintiff was irresponsible without any regards to his profession as a lawyer and as a leader of a political party. I find as pleaded by the plaintiff in para. 6 of the Reamended statement of claim that the words complained of imputed to the plaintiff as a person, a lawyer and a leader of political party one of conduct or motive that is dishonourable, dishonest, selfish, ruthless, untrustworthy, hypocritical, unethical, profiteer, unscrupulous, a villain and not fit to be a lawyer or a state leader of DAP. Such imputations in my opinion were defamatory of the plaintiff and of him in the way of his profession, his office and in relation to his conduct. (See: *Gatley on Libel and Slander* : 8th Edn., paras. 50, 60, 62).

Learned Counsel for the 1st defendant contended that the words complained of as pleaded in para. 5 of the reamended statement of claim could not in their natural and ordinary meaning or inferential meaning meant or capable of bearing any of the meanings ascribed by the plaintiff in para. 6 of the reamended statement of claim. He further submitted that the words complained of must be read in the light of what was published of the plaintiff's conduct and speech as reported in (Ex. D3 with Ex. D3 (T)). The words complained of must also be read in the light of the full press statement issued by the 1st defendant and not to be taken out of context. This submission was in line with para. 7 of the reamended statement of defence

of the 1st defendant. However, in the first place the learned defence Counsel conceded that what was published in (Ex. D3 with Ex. D3 (T)), that is, in the *See Hua Daily News* on 8 June 1985 was only the gist of what was said by the plaintiff and his conduct on the evening of 5 June 1985.

My understanding of this submission is that what the 1st defendant stated in his press statement has to be looked at in the light of what was reported in the *See Hua Daily News* on 8 June 1985 (Ex. D3 with Ex. E3 (T)) and that he could not be blamed if what he said might be offending as he was only responding to what was reported by *See Hua Daily News* on 8 June 1985. With respect, this argument cannot be correct. A person should be responsible for what he said and it should not be an excuse for any error of what he said just because he relied on another person's report. If he chose to rely on that other person's report when he made his statement he did it at his own risk. But such circumstance offers no defence to an action for defamation. (See: *Syed Husin Ali v. Sharikat Percetakan Utusan Melayu Bhd. & Anor.* (*supra*)). It is also to be noted that in evidence the plaintiff testified that (Ex. D3) was only a fairly accurate gist of his speech on the evening of 5 June 1985 and he also stated that there were additions made which were not said by him, for instant, the reference to ministers. These stood unchallenged.

I have also considered the words complained of in the light of the full text of the press statement of the 1st defendant as contained in (Ex. P6), the *See Hua Daily News* report dated 8 June 1985 (Ex. D3 with Ex. D3 (T)) and the transcript of the plaintiff's speech (Ex. D2 (A) and Ex. D2 (B)) before coming to my conclusion as above. However, such exercise only added to my initial impression that the words complained of were capable of defamatory meaning and imputation and indeed they were defamatory of the plaintiff. I have also considered the point that although the 1st defendant stated in his press statement that the speech of the plaintiff was reported in many Chinese newspapers according to DW1 Ting Meng Hock there was no similar report which appeared in other newspapers as in (Ex. D3). The 1st defendant did not specifically identify that he was referring to (Ex. D3) in his press statement. Readers of (Ex. P6) might have not also read (Ex. D3) or those who could not read Chinese would surely form their views without knowing the content of (Ex. D3).

Further, it is also my finding that there were misquotation, misinterpretation and omission in (Ex. P6) of passages as found in (Ex. D3 with Ex. D3 (T)) which could have perhaps qualified the ordinary meaning of the words complained of and I find no explanation for that. For instance, the context in which the words 'fists' and 'parang' were used by the plaintiff were not in the same context as stated by the 1st defendant in (Ex. P6). Also there was an omission in that the plaintiff did tell his listeners that evening to lodge a police report first. I can only conclude that it was intended solely to cause embarrassment to the plaintiff. [See: *Rajagopal v. Rajan* (*supra*)). It is also to be noted that (Ex. D2(A) with Ex. D2 (B)) should not be given weighty consideration as it only came to existence in July 1985 (see the evidence of DW1). The 1st defendant did not have the opportunity to know or read (Ex. D2(A) before he made the press statement as contained in (Ex. P6). At most in evidence the 1st defendant stated that he was told by DW1 of the existence of a tape recorded speech of the plaintiff but did not testify that he heard the recording before he made the press statement. Thus, no reliance could have been placed by the 1st defendant on the tape recording when he issued the press statement as contained in (Ex. P6). Consequently, as Lord Selborne LC said in *The Capital and Counties Bank v. Henty* (*supra*):

> The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense.

Paragraph 7 of the reamended statement of defence of the 1st defendant therefore fails. Similarly as para. 6 of the 2nd defendant's reamended statement of defence is almost identical to that of the 1st defendants para. 7, it also fails.

Before proceeding to deal with the defences under issues (b), (c) and (d), I would like to deal with one issue which was raised by Counsel for the plaintiff in the early part of his final submission. It is on the issue of failure of the defendants in pleading alternative meanings to the words complained of in relation to the plea of fair comment. The cases of *Control Risk Ltd. v. New English Library Ltd. & Anor.* [1989] 3 AER 577, *Lee Kuan Yew v. J.B. Jeyaretnam* [1970] 3 MLJ 331 and *Lee Kuan Yew v. Chin Vui Khen* [1991] MLJ 494 were cited. I do not see what was the main purpose for Counsel raising this issue at that late stage other than implying that it was obligatory for the defendants to plead other alternative meaning or meanings to the words complained of if the defendants do not agree to such meaning as given by the plaintiff. With respect if that was the intention then I do not think it is a correct submission as a defendant is not obliged to plead the meaning of the words complained of. Mustill LJ in *Viscount De L'Isle v. Times Newspapers* [1987] 3 ALL ER 499 at p. 507 has this to say:

> First, as to the *Lucas-Box* case. Two different interpretations have been put on the decision and judgment of this Court. The first is that a defendant is now required to plead the meaning which he ascribes to the writing of which the plaintiff complains if that differs from the meaning pleaded by the plaintiff. Second, that the defendant is obliged to make clear what version of the facts it is that he asserts to be true.
>
> Whilst I understand why the authors of the headnotes should have adopted the first interpretation of what the Court decided and said, I believe it to be mistaken. Whatever the state of the law and practice about the defendants' entitlement to plead a meaning if he thinks fit, it would have been a large step for the Court to upset what appears to have been a settled rule of practice that he cannot be obliged to do so. I do not read the relevant passage of the judgment [see [1986] 1 ALL ER 177 at 183; [1986] 1 WLR 147 at p. 153] as requiring this to be done, and it is significant that in the *Lucas-Box* case itself the radical amendments insisted on by the Court did not extend to any statement of the defendants' case about the true meaning of the articles in question.

Further on the same page, his Lordship went on to say:

> Thus, on the law as it stands at present I do not consider that the defence can be criticised for omitting any statement of the defendants' chosen interpretation of the article.

(See also: *Prager v. Times Newspapers Ltd.* [1988] 1 All ER 300 in particular the judgment of Nicholls LJ at p. 311)

It is to be noted that learned Counsel for the plaintiff did not raise this issue before trial or even in the course of the trial by way of preliminary issue. I did not find also the issue being taken when learned Counsel for the plaintiff was dealing with the defence of fair comment in his submission.

I now turn to the defence pleaded by both the defendants. From the reamended statements of Defence filed by both the defendants two defences of almost identical forms were pleaded, namely, qualified privilege and fair comments made in good faith and without malice on matter of public interest. The 2nd defendant in para. 10 of its reamended statement of defence also pleaded that (Ex P6) was published without malice and the publication was a matter of public interest.

I deal first with issue (b), that is, the defence of qualified privilege. There are 3 particulars given in support of the plea of qualified privilege that are common to both defendants, namely,

(i) that the statements or words were published in response to the remarks and advice given by the plaintiff to the Kuching Tenants' Association;

(ii) that the statements or words were published under a sense of duty and honest belief for the good and welfare of the society and

(iii) publication by the defendants were done under social and/or moral duty having legitimate interest and the recipients have corresponding interest or duty to receive the publication. The 1st defendant also relied on paras. 1, 2, 3 and 4 of his Reamended Statement of Defence as one of the particulars for the plea of qualified privilege. As for the 2nd defendant it also relied on the issue that the publication was a fair and accurate report of a press conference held by the 1st defendant and further, as proprietor, publisher and printer of a newspaper the 2nd defendant was duty bound to publish the said statements or words due to the remarks and advice given by the plaintiff to the Kuching Tenants' Association.

It is for both the defendants to prove the facts and circumstances which established the occasion as qualified privilege when the words complained of were published. As was said by Lord Atkinson in the case of *Adam v. Ward* [1917] AC 309 at p. 334.

> a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has no interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

(See also: *Rajagopal v. Rajan (supra)* and *Maidstone Pte. Ltd. v. Takenada Corpn.* [1992] 1 SLR 772). I shall first deal with the common particulars given by both the defendants to support their plea of qualified privilege.

In summary the defendants say that the words complained of were published in response to what the plaintiff had said to the Kuching Tenants' Association and that they were therefore duty bound to publish the words complained of in the honest belief that it was good for the society and the recipients have corresponding interest to receive such publication.

Bearing in mind the common particulars as pleaded by the defendants in support of their plea of qualified privilege I do not find the evidence adduced supports such particulars or circumstances. The 1st defendant testified that what he wanted to do was to advise SUPP members only and the gist of his advice was for SUPP members to remain cool and calm in the face of what was reported in the *See Hua Daily News* (Ex. D3). As the secretary of the Kuching SUPP Branch he claimed he had the duty to do it. As for DW3 he testified that the news item would be of interest to the readers of his newspaper as it touched on the said Repealing Ordinance. Further, it may be said that the 1st defendant issued the press statement contained in (Ex. P6) in response to what appeared in the *See Hua Daily News* on 8 June 1985 (Ex. D3) attributing it to the plaintiff. But I do not see how the extent and the contents of the press statement which appeared in (Ex. P6) justified the claim of doing it under the sense of duty and a fair response to what appeared in (Ex. D3). The 1st defendant said that he only wanted to pass advice to SUPP members to remain cool and calm. But the press statement does not reflect that. Indeed the 1st defendant agreed that not all he said were

advice and those not being advice were also part of the words complained of. Thus it cannot also be said that he was under an honest belief that he was only doing his duty and in good faith when he published the words complained of:

> What is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally tautologously termed, "honest belief." per Lord Diplock in *Horrocks v. Lowe* [1975] AC 135 at p. 150.

Further, the 1st defendant claimed to have issued the press statement as he was the secretary of the SUPP Kuching Branch. But on examination of the contents of the press statement it is my view that the dominant motive in issuing it was not the carrying out of the alleged duty but more to attack and to embarrass the plaintiff who happened at that time to be in a rival political camp. (See: *Horrocks v. Lowe* (*supra*)). If it was a possible violence which worried the 1st defendant then there were other specific bodies such as the police to take care of that. In fact the 1st defendant did realise that by lodging a police report later. But to issue a press statement for the newspapers to publish is not a reasonable execution of the perceived sense of duty. Further, if the 1st defendant was only interested to advise SUPP members the nature of the press statement and the extent of the publication do not support that claim. Non-SUPP members would have no interest in receiving such press statement in the first place and on this point alone the claim of privilege is demolished. As Hepworth J stated and which I have no reason to disagree in *Abdul Rahman Talib v. Seenivasagam & Anor.* (*supra*) that:

> It is the duty of everyone, in the interest of public efficiency and good order, to bring any misconduct or neglect of duty on the part of a public officer or employee, or any public abuse, to the notice of the proper authority for investigation. Any complaint or information as to such misconduct, neglect of duty, or abuse, though volunteered, is privileged, provided it is made in good faith to the person or body who has the power or duty to remove, punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint. Any citizen who *bona fide* believes that wrong has been done has the right and duty to bring the alleged fact before the proper authority for investigation. In doing so he exercises an undoubted privilege which is not in the public interest to penalise.
>
> But no privilege will attach to any such complaint or information if addressed to a person or body having no jurisdiction or control over the person whose conduct is impugned nor any power or duty to grant redress for, or inquire into, the abuse complained of. No protection can be afforded to a person who wrongly assumes the facts which constitute a privileged occasion. So no privilege will attach to a complaint as to the conduct of a public official if it is given out for publication in the newspapers in advance of its delivery to the proper authority for investigation.

(See also: *S. Pakianathan v. Jenni Ibrahim* [1988] 2 MLJ 173*)*

In my judgment therefore the claim of qualified privilege by the 1st defendant fails.

As for the claim of privilege by the 2nd defendant based on all the particulars given I do not find such claim can succeed based on the evidence adduced. From the evidence of DW3 nothing was mentioned about any sense of duty to publish it on the part of the 2nd defendant and the corresponding duty on the part of the readers:

> Public interest and public benefit are necessary ... but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough.

per Stephenson LJ at p. 327 in *Blackshaw v. Lord* [1983] 2 All ER 311.

Learned Counsel for the 2nd defendant submitted that the cases of *Cox v. Feeney* [1863] 176 ER 445 and *Webb v. Times Publishing Co. Ltd.* [1960] 2 ALL ER 789 are applicable to the instant case. With respect, it is my view that these cases should be considered in the light of *Blackshaw v. Lord (Supra)* which learned Counsel did not do so. The facts and circumstances in those two former cases by themselves were different from the instant case and I do not think therefore that they are directly applicable in the instant case.

Thus, I find the claim of qualified privilege by the 2nd defendant also fails. I have also considered whether or not what the 1st defendant stated in his press statement can be an answer to any form of attack levied by the plaintiff against the 1st defendant or against SUPP or against the Taib's government as submitted by learned Counsel for the 2nd defendant. In the first place the 1st defendant did not testify that he was defending an attack by the plaintiff. He said that he was only giving advice to SUPP members. Further, I find that at looking at (Ex. P6) and [Ex. D3 with Ex. D3(T)] the contents of (Ex. P6) cannot be a mere defence. It was an attack on the plaintiff as a person, lawyer and as a politician. On this issue too the defendants do not succeed on the plea of qualified privilege. (See: *Lee Kuan Yew v. J.B. Jeyaretnam* [1979] 1 MLJ 281; *Turner v. MGM Pictures Ltd.* [1950] 1 All ER 449). I do not find also the facts of this case similar to that of *Laughton v. Sodor & Man* [1872] LR 4 PC 495 as submitted by learned Counsel for the 2nd defendant. In that case there was an attack by the plaintiff on the Bishop earlier on. Subsequently, the Bishop answered the allegations. The Bishop was dealing with his own clergy and clearly had an interest in explaining and defending his conduct and the clergy would be deeply interested in that explanation. Paragraph 5A of the reamended statement of defence of the 1st defendant and para. 8 of the reamended statement of defence of the 2nd defendant therefore fail.

The 1st and 2nd defendants next pleaded issue (c), that is, the defence of fair comment but in the form of "rolled-up" plea. A "rolled-up" plea is but a plea of fair comment. (See: *Sutherland & Ors. v. Stopes* [1925] AC 47). The following elements must be established by the defendants in order to succeed on their plea of fair comment, namely,

(i) the words complained of are comment, though they may consist of or include inference of facts;

(ii) the comment is on a matter of public interest;

(iii) the comment is based on facts, truly stated, fair and one which a fair minded person can honestly make on the facts proved. [See:*J.B. Jeyaretnam v. Goh Chok Tong* [1985] (*supra*)).

On element (i) it is settled that a comment is a statement of opinion on facts. A libellous statement of fact is not a comment or criticism on anything. (See: *Lee Kuan Yew v. J.B. Jeyaretnam* (*supra*)). In order to decide whether a statement is capable of being a comment or a statement of fact will have to be gathered from the document wherein the words complained of are found. There is no necessity to look at other documents though relevant to come to such determination. In the case of *Telnikoff v. Matusevitch* [1991] 4 All ER 817, Lord Keith at p. 822g stated thus:

> The question then arises whether it is permissible to have regard to the whole terms of the plaintiff's article, not only the sentence from it quoted in the letter, in determining whether paras. (6) & (7) of the letter contain statements of fact or are pure comment. In my opinion the letter must be considered on its own.The readers of the letter must have included a substantial number of persons who had not read the article or who, if they had read it, did not have its terms fully in mind. If to such persons the letter appeared in paras. (6) & (7) to contain statements of fact about what the plaintiff had written in his article, which as I have

already indicated might well be the case, then in the eyes of those persons the plaintiff would clearly be defamed. The matter cannot turn on the likelihood or otherwise of readers of the letter having read the article. In some cases many readers of a criticism of some subject matter may be familiar with that subject matter but in other cases very few may be, for example where that subject matter is a speech delivered to a limited audience. The principle must be the same in either case.

The principle of law enunciated above has in fact been considered earlier on by the then Federal Court of Malaysia in the case of *Rajagopal v. Rajan* (*supra*) where the Federal Court did not disturb the ruling of the trial Judge to confine himself to the forwarding letter when dealing with the defence of fair comment. It has also been stated in our Court in the case of *Abdul Rahman Talib v. Seenivasagam & Anor* (*supra*) and which I have no reason to differ that a person cannot avail himself of any fact as justifying his comment of which he was ignorant at the time when he published the words complained of. It is the state of mind of a defendant when he published the defamatory words that is most material.

In the present case therefore I need only to look at the contents of (Ex. P6) in determining whether or not the words complained of are capable of being comments or statements of fact and whether or not they are in fact either one.

On reading the contents of (Ex. P6) with due regards to the words complained of, I am of the view that the words complained of are capable of being comments and I do find them being comments as such. The 1st defendant was making comments on the conduct of the plaintiff and on matters raised in his speech, *inter alia*, such as the use of 'fists' and 'parangs' and the right to self-defence which the 1st defendant claimed to have been said by the plaintiff and reported in (Ex. D3). Of course whether or not his comments were based on facts truly stated in order to be fair comment will be dealt with later in this judgment.

On element (ii) there is no dispute that the subject-matter involved, *inter alia,* was the said Repealing Ordinance 1984 which was a matter of public interest judging from the articles which appeared in the local dailies as stated by DW3 and which were not disputed by the plaintiff. It is also in evidence that about 1,000 shophouses with about 5,000 to 6,000 tenants were affected by the said Repealing Ordinance. Those affected were therefore legitimately interested in or concerned at what was going on or what would happen to them or to others. [See:*London Artists Ltd. v. Littler* [1969] 2 All ER 193]. As such the said Repealing Ordinance was a matter of public interest. Further, the event that took place during the Kuching Tenants' Associations' extraordinary general meeting held on 5 June 1985 together with the gist of the speech of the plaintiff as reported in (Ex. D3) in my view was also a matter of public interest. The gist of the speech as reported in (Ex. D3) touched on issues such as the use of 'fists' and 'parangs' and the right to self-defence.

Learned Counsel for the plaintiff submitted that the advice or speech given by the plaintiff to the tenants was not a matter of public interest. With respect I do not agree to this contention as the speech touched on an issue, namely the repeal of the Rent Control Ordinance, which was very much a public issue having attracted comments from the public as appeared in the local newspapers. Further, what appeared in (Ex. D3) clearly made those affected, though not present that evening of 5 June 1985, legitimately interested in or concerned at what was going on and as to what would happen to them. In my judgment therefore I find that the comments made were on matters of public interest.

As regards to element (iii) it is a settled law that on a plea of fair comment any comment made must be based on facts truly stated in order to be fair. (See: *Kemsley v. Foot* [1952] 1 All ER 501). This of course is subject to s. 9 of the Defamation Act 1957:

> In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter, see *Cunningham-Howie v. F.W. Dimbleby & Sons, Ltd.* ([1950] 2 ALL ER at p. 883).They are the facts on which the comments are based or from which the inferences are drawn : as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts, see *Kemsley v. Foot*; but he must get them right and be ready to prove them to be true ... If in his original article he sets out basic facts which are themselves defamatory of the plaintiff, then he must prove them to be true ... It is indeed the whole difference between a plea of fair comment and a plea of justification. In fair comment he need only prove the basic facts to be true. In justification he must prove also that the comments and inferences are true also". per Lord Denning MR at p. 198 E-G in *London Artists, Ltd. v. Littler* (*supra*).

In order for the comment to be fair it must not also have imputation of corrupt or dishonorable motive of the person whose conduct or work is criticized except if the fact so warrants. Further, it must be the honest expression of the defendant's real opinion. (See: *Lee Kuan Yew v. J.B. Jeyaretnam* (*supra*) and *Gatley on Libel and Slander*, 8th Edn. para. 729).

In the present case the 1st and 2nd defendants upon their reliance to the "rolled-up" plea gave particulars as required in para. 6 of the reamended statement of defence of the 1st defendant and para. 11 of the reamended statement of defence of the 2nd defendant. Save for the reliance of s. 9 of the Defamation Act 1957 by the 1st defendant both paragraphs are identical. Both defendants pleaded as statements of fact the following namely:

(a) that the plaintiff had advised the Tenants to resort to using "fists" or "parangs" when being confronted by unreasonable shop owners.

(b) that the plaintiff did say in the Kuching Tenants' Association's extraordinary general meeting that using "parang" would not be a criminal offence even in the presence of police if the landlords should remove the Tenants' things when the police did nothing about it.

Both defendants then pleaded that the above statements of fact are true on reliance of (Ex. D3 with Ex. D3 (T)), p. 1 of (Ex. P1) and (Ex. D2(A) with Ex. D2(B) as translation of D2(A)).

Though the defendants have pleaded what they claim as statements of fact I am also of the view that they do not necessarily be confined to those. As Lord Porter said in *Kemsley v. Foot* (*supra*) at p. 505B that:

> The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action ...

But the principle remains that the facts must be truely stated in order for the comments to be fair. If they are not then the defence of fair comment is not available. (See:*Turner v. MGM Pictures Ltd.* (*supra*)*; Truth (N.Z.) Ltd. v. Avery* [1959] NZLR 274). Further, on a plea of fair comment it matters not if not all the facts can be proved. Any facts sufficient to justify or support the comment so as to make it fair will entitle the plea to succeed. (See: *Kemsley v. Foot* (*supra*)).

I have considered in this present case the statements claimed as statements of fact upon which the comments were made in the light of (Ex. P6), (Ex. D3 with D3(T)), (Ex. D2(A) & Ex. D2(B)), (Ex. P7) and p. 1 of (Ex. P1). I am of the view that an attempt was made to create an impression that the plaintiff said only what were claimed by the defendants as the statements of fact. But this is not the case. Though the words "fists" and "parangs" were used, they were not used in the way the 1st defendant put it in (Ex. P6). The plaintiff qualified in terms

of self-defence to persons and properties and not "in the pretext" of self-defence as stated by the 1st defendant. Further, the 1st defendant in (Ex. P6) did not even state that the plaintiff did say about reporting to the police. This fact was totally suppressed. The only mention of police was that the 1st defendant would be reporting the plaintiff's speech to the police. Yet even in (Ex. D3 read with Ex. D3(T)) the plaintiff was reported to have said that a police report should be made first. This is confirmed by (Ex. D2(A) with Ex. D2(B) as translated). And in the particulars of statements of fact given by the defendants it is also put as a fact that the plaintiff did say that the use of 'parang' even in the presence of police is not criminal offence if the landlords should remove the tenants' goods and the police does not do anything. However, I do not find such statement being made by the plaintiff expressly or by implication as reported in (Ex. D3 with Ex. D3(T)) or in (Ex. D2(A) with Ex. D2(B) as translated) especially on the use of 'parang' in the presence of the police. I find therefore that both the statements relied as statements of fact are not facts truly stated.

I have also considered the probability of any other substratum of fact that may be sufficient to justify the comments of the 1st defendant but I find no such sufficient fact. For this reason therefore that I find the comments of the 1st defendant and reported by the 2nd defendant as not capable of being fair and indeed they are not fair. (See: *Jones v. Skelton* [1963] 3 ALL ER 952). Consequently, the plea of fair comment fails for both the defendants.

I also find that applying the objective test the comments made by the 1st defendant cannot be one which a fair-minded person can honestly make. In the first place the comments were not based on facts truly stated. Secondly, it is in evidence through the 1st defendant himself that his purpose of making the press statement was to advise members of SUPP to remain calm. But as agreed by him under cross-examination that not all of what he said were advice. Further, he did not take sufficient caution before making the press statement. Indeed it only took him one Sunday afternoon to prepare the press statement. He did not bother to do more than just talking over the telephone with DW1: Ting Meng Hock. Incidentally, DW1 did not testify that the 1st defendant spoke to him on the news report of *See Hua Daily News* in (Ex. D3 with Ex. D3(T)). There was an element of recklessness and haste without making proper inquiries on the part of the 1st defendant. (See: *S. Pakianathan v. Jenni Ibrahim* (*supra*). Indeed I must say that the 1st defendant was carried away by his feeling as shown from the words used and his deviation from his main intention of only advising SUPP members. These actions of the 1st defendant have gone beyond the bounds of a fair-minded man and beyond the bounds of fair comment. (See: *London Artists Ltd. v. Littler* (*supra*)). Accordingly for this reason too I find the comments not being one that can be said to be fair comments. Thus, the plea of fair comment for this reason also fails for both the defendants.

As such para. 6 of the reamended statement of defence of the 1st defendant fails. Since the reamended statement of defence of the 2nd defendant on fair comment is identical to that of the 1st defendant para. 11 of the reamended statement of defence of the 2nd defendant also fails. (See also:*Gatley on Libel and Slander* 8th Edn.: paras. 730 -789).

Under para. 7 of his reply, the plaintiff pleaded that when the words complained of were published the defendants were actuated by express malice. Particulars were given accordingly.

Malice can be established by way of intrinsic and extrinsic evidence. Express malice has been given a meaning broadly by our Supreme Court as malice in the popular sense of or desire to injure the person who is defamed. (See: *S. Pakianathan v. Jenni Ibrahim* (*supra*)). Instances of malice have been accepted by our Courts as ill-will or spite or some previous

quarrel or bad relationships or any indirect or improper motive in the mind of the defendant at the time of publication and actuating it. Malice can defeat both defences of qualified privilege and fair comment. (See: *Rajagopal v. Rajan* (*supra*)). Malice can also be inferred where the defendant made defamatory statement knowing it to be false or he did not believe what he published was true or that he made it recklessly, not caring whether it is true or false or where he deliberately stopped short in his inquiries in order not to ascertain the truth. Generally, honest belief of the truth of the statement is sufficient to negate malice. But if it can be shown that the dominant motive of the defendant in making the statement was to vent personal spite or the desire to injure or to obtain private advantage or some other purposes rather than in the exercise of relevant duty, then honest belief itself is not sufficient to rebut express malice. Further, where the defendant's desire to comply with the relevant duty or to protect relevant interest is not the significant part for his reason in publishing the defamatory statement express malice can be inferred. But in the first place it is for the plaintiff to prove affirmatively that the defendant did not believe what he published was true or was indifferent to the truth or falsity of the statement.

Yet malice may also be inferred where the defendant's publication incorporated defamatory matter which was not really necessary to satisfy the duty or protection of interest giving rise to the privilege occasion. (See: *Horrocks v. Lowe* (*supra*) and *Maidstone Pte. Ltd. v. Takenada Corpn.* (*supra*)). Malice may also be inferred either from the terms of the communication itself as for example where the language is unnecessarily too strong for the occasion and circumstances. (See: *Abdul Rahman Talib v. Seenivasagam & Anor.* (*supra*)).

In the present case the 1st defendant testified that his purpose was to pass on his advice to members of SUPP in view of what appeared in (Ex. D3). It is also in his evidence that other than asking DW1 over telephone whether the words 'fists' and 'parang' were used by the plaintiff nothing else were elicited from DW1; that he based his statement only on (Ex. D3) and that having spoken to some others who were not identified he took it that (Ex. D3) was the gist of what the plaintiff had said on the evening of 5 June 1985. But under cross-examination the 1st defendant admitted that some of the words complained of were not advice. He also testified that he spent the Sunday afternoon writing up the statement. It is also to be noted that although, according to the 1st defendant, DW1 told him of the existence of a tape-recording of the speech of the plaintiff no attempt was made by the 1st defendant to hear what was recorded before making the press statement. He had the time to hear it as he came to know of the existence of the tape recording in the late morning of that Saturday. Further, there were other matters reported in (Ex. D3) such as reporting to the police and the act of self-defence but these were not referred to either expressly or by inference in his press statement. The 1st defendant had also made up his mind to lodge reports against the plaintiff to the police and to the Sarawak Advocates Association earlier on. These two bodies were the two bodies that were in the position to act. Yet the 1st defendant even before making the reports called for a press conference to deliver his prepared press statement which did not contain solely advice to SUPP members. It is also to be noted that there were no similar reports in other newspapers as that of (Ex. D3), which was in Chinese. This was confirmed by DW1 in evidence. But the 1st defendant found it necessary to make the press statement even to the local English newspapers.

The conduct of the 1st defendant subsequent to the publication of (Ex. P6) is also relevant on the issue of malice. Though failure to correct a statement which the person subsequently discovers to be false is not evidence of malice if he honestly believed the statement at the time when he made it, malice can be inferred when he knew the statement was false when he made it. (See: *Gatley on Libel & Slander* 8th Edn. para. 1342 and *S. Pakianathan v. Jenni*

Ibrahim (*supra*)). In the present case, (Ex. D3) was read by the 1st defendant being proficient in Chinese. But he did not make any reference in his press statement (Ex. P6) what were reportedly said by the plaintiff such as first lodging of police report and when self-defence was to be used which issues were stated in (Ex. D3).

Instead, the 1st defendant made further statement purporting to affirm that what he said in (Ex. P6) as beyond dispute as shown in (Ex. P7). On reading (Ex. P7) itself in particular the passage attributed to the plaintiff and assuming it is correct, it is obvious that even that passage was not given due consideration when the 1st defendant made his press statement (Ex. P6). It is also to be noted that the plaintiff invited the 1st defendant through the news media to come to Sibu to hear the plaintiff repeating what he had said on the evening of 5 June 1985. But the invitation was not accepted. Further, the 1st defendant did make a police report after the publication of (Ex. P6). The occasion was duly published as well. (See Ex. P4). But after the publicity the 1st defendant did nothing. He testified that he did not do any follow up with his police report. No explanation was given. So much for his interest in preventing violence. (See: *S. Pakianathan v. Jenni Ibrahim* (*supra*)).

Bearing in mind the principle of malice in the cases cited earlier on and on examination of the evidence as discussed above I find therefore that when publishing the words complained of and indeed the whole of the press statement as contained in (Ex. P6) the 1st defendant was actuated by express malice.

It is also my finding that the dominant motive of the 1st defendant in publishing the words complained of was the desire to make political capital and in doing so outweighed his sense of caution and thus what he did was actuated by malice.

Consequently, even if the 1st defendant has successfully established the defences of qualified privilege and/or fair comment and that I am wrong in my conclusions, the existence of malice would defeat both the defences.

As to whether malice exists on the part of the 2nd defendant is also to be gathered from what was printed, the manner of printing or publishing, the precaution taken, the past relationship and any subsequent conduct. (See: *Gatley on Libel & Slander* 8th Edn., paras. 1338, 1339, 1340, 1342). It is in the evidence of DW3 that (Ex. P6) was published as it was a report on a press conference called by SUPP and that the readers of his newspaper would be interested on the report. He mentioned however that it was fair without any clear reason given. There was no attempt made to find out from the plaintiff if what were commented as in (Ex. P6) were correct. (See: *S. Pakianathan v. Jenni Ibrahim* (*supra*).

Further, the heading of the report was the doing of the editor of the 2nd defendant. The report was also published on front page with bold-typed headline. It is also not in dispute that the plaintiff had sued the 2nd defendant in a Suit No. 94 of 1979 where the 2nd defendant had to pay damages and apologised to the plaintiff in open Court. According to the plaintiff his relationship with the 2nd defendant was so bad that attempt was made by leaders of DAP to improve the relationship but without success. DW3 denied this and testified that his newspaper did publish news related to the plaintiff which were good publicity for him. But if that was true DW3 did not explain why (Ex. P6) and (Ex. P7) were published without any attempt to get the plaintiffs' version before or after the publication. It is not in dispute that the plaintiff called a press conference after the publication of (Ex. P6) but the 2nd defendant through its reporter did not show any interest to have a report done for that press conference; instead it proceeded to publish (Ex. P7).

From these I can only conclude that the 2nd defendant was actuated with malice when (Ex. P6) was published. It is to be noted that DW3 only said that he believed the comment was fair. It was never adduced from him if he honestly believed in the truth of the statement as published in (Ex. P6). (See: *Horrocks v. Lowe* (*supra*) and *Leverman v. Campbell Sharp Ltd.* [1987] 36 DLR 401). Consequently, the defences of qualified privilege and fair comment of the 2nd defendant, even if it had succeeded in establishing them, fail by reason of malice.

As for para. 9 of the Reamended Statement of Defence of the 2nd defendant I do not find any basis for it. It pleaded that (Ex. P6) was a fair and accurate report of a press conference called in response to what was said by the plaintiff during an extraordinary general meeting of the Kuching Tenants' Association held on 5 June 1985 (The reamended statement of defence stated it was 4 June 1985 but from evidence of PW1 (plaintiff) and DW1 it was on 5 June 1985. But nothing was said about this particular plea in submission by the learned Counsel for the 2nd defendant. I think rightly so because this plea does not satisfy s. 12 of the Defamation Act 1957. In the first place the report was not on a public meeting but on a press conference held in response to a report of an extraordinary general meeting of the Kuching Tenants' Association. I do not think that s. 12, in particular item 2 of Schedule II, should be given such an extended meaning. (See: *Gatley on Libel and Slander*, 8th Edn. para. 666). Secondly, even assuming the 2nd defendant's plea is correct, such a defence is defeated by the failure of the 2nd defendant to publish the report of the press conference called by the plaintiff after the publication of (Ex. P6). It is in evidence that a reporter of the 2nd defendant by the name of Sulok Tawie was present but without any explanation he left. DW3 also did not give any reason for such departure. He only said that no report was made as his reporter could not get in touch with the plaintiff. But he only assumed this and he did not make any attempt himself to contact the plaintiff. I doubt the veracity of this piece of evidence because if DW3 was truly looking for the plaintiff he would have contacted his reporter to find out instead of just assuming.

(See: *S. Pakianathan v. Jenni Ibrahim* (*supra*)).

In respect of para. 10 of the reamended statement of defence of the 2nd defendant I do not think it has any further merit in view of my on malice. Furthermore, as stated earlier on in this judgment mere public interest does not satisfy the requirement of the defence of qualified privilege. (See: *Blackshaw v. Lord* (*supra*)).

There is one last matter that requires consideration on the issue of liability. The 1st defendant issued in his personal capacity and as an officer of SUPP.

It is settled that in an action for libel the plaintiff must prove who published the libel, and *prima facie* only those who have published it either themselves or by their servants or agents or have authorised its publication are liable. (See: *Mercantile Marine Service Association v. Toms & Ors.* [1916] 2 KB 243).

In the present case the 1st defendant admitted he published the words complained of. He also said that he was then the secretary of the SUPP Kuching Branch and the press statement was from SUPP Kuching Branch. But he was the only one sued in his personal capacity as well as an officer of SUPP Kuching Branch. Since he was the publisher himself I am of the view that the 1st defendant can be liable in both capacities and I so hold.

In my judgment therefore the 1st and 2nd defendants are liable. Unless agreement as to the quantum of damages is reached I will fix another date for the hearing of that issue. As the plaintiff has succeeded in this action I also grant the injunction in terms as prayed. I order accordingly.

I shall deal with the issue of costs after the hearing on the quantum of damages.

Finally, in the course of hearing this case I find that co-operation between Counsels has been lacking. Indeed suspicion was prevalent. I find this is not good for the profession and I hope that the words of Singleton LJ in *Beevis v. Dawson* (*supra*) and I quote:

> The training of one who is called to the Bar in this country is intended to help him to understand that a member of the Bar is a helper in the administration of justice. He is there to help the Judge, and, when there is a jury, to help the jury, to arrive at a proper result in the dispute between the parties.

will be given due regard and adherence.

Also found at [1992] 4 CLJ 1839